The latest statement of how and when a Court of Appeal will interfere in a case of this nature is contained in the following passage from the judgment of Morris L.J., in the case of *Scott* v. *Musial*[4]:—

"Where there is an appeal from the decision of a Judge sitting alone, the appeal is by way of rehearing. The rehearing applies to the issue of damages as well as to other issues. But it is recognised that the fixation of damages is so largely a matter of opinion or of impression that differences of calculation or assessment are to be expected. There is, to some extent, an exercise of judicial discretion. It is for this reason that, if three judges of the Court of Appeal consider that the amount of general damages that they would have awarded would have been a figure different from that decided by the trial Judge, they will not, for that reason alone, give preference to their own figure; they will only do so if satisfied that the Judge has acted on a wrong principle of law or has misapprehended the facts, or has, for those or other reasons, made a wholly erroneous estimate of the damage suffered:"

In the present case I agree that the trial Judge may have "misapprehended the facts" in the sense that *ex facie* he has failed to make allowance for a certain amount of the deceased's earnings going towards his own maintenance. I am not, however, prepared to say that for that or any other reason he has "made a wholly erroneous estimate of the damage suffered". He may have failed to make any allowance for the one factor that has been mentioned. On the other hand he may well have made an excessive allowance for other factors and so have been unduly cautious in arriving at the number of years purchase he was going to take. Again, he may have been unduly cautious in the view he took of the total amount of the deceased's earnings.

As was said by Lord Goddard in the case of *Heatley* v. *Steel Co. of Wales, Ltd., supra*:—

"The court has, in the best way it can, to find a sum of money which it thinks will fairly compensate the family. One Judge may arrive at it in one way and another Judge in another."

This appeal is by way of rehearing and so, within the limits imposed by a number of authorities of which the latest is *Scott* v. *Musial, supra*, we have to apply our minds to the whole question of damages. Applying my own mind to that question and giving the matter the best consideration I can I am unable to disagree with the trial Judge's conclusion that a sum of $21,500 will compensate the family fairly but not more than fairly for what it has lost Nor do I see any reason to quarrel with the trial Judge's figure of $3,500 as damages for loss of expectation of life though as that falls to be deducted from the $21,500 the point is largely academic.

I would accordingly dismiss the appeal with costs.

Before departing from the case I would like to comment as in the case of *Nam Thiam Siew* v. *Chuang Wai Lan*[5] on the amount of costs that have been thrown away in preparing the record of appeal. Exactly half the record consists of a so-called agreed bundle of documents which contains nothing except the record of some Police Court proceedings where the first defendant to the action, who is not even a party to this appeal, was prosecuted in the Magistrate's Court at Kajang and a long correspondence among the solicitors in the case. There is not a word in all this mass of paper which has any bearing on the subject matter of the appeal which was the quantum of damages.

Hill J.A.: I have had the advantage of reading the Judgment of the learned Chief Justice. I am in agreement with it and have nothing to add.

Good J.A.: I agree with My Lord's Judgment. I also am of the opinion that the sum of $21,500, however it may have been arrived at, represents fair compensation for the family of the deceased in all the circumstances.

I would therefore dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Bannon & Bailey*; *Kam Woon Wah.*

MITRA & CO. v. THEVAR & ANOR.

[C. A. (Thomson C.J., Hill and Good JJ. A.) February 27, 1960]

[Johore Bahru — F.M. Civil Appeal No. 26 of 1959]

Practice and Procedure — Costs — Liability of Solicitor to pay costs personally — Jurisdiction of Court under R.S.C. 1957, O.65 r.11.

O.65 r.11 is substantially, although not in every respect, the same as the corresponding English rule. In considering whether the misconduct or default of a solicitor is such as to attract the provisions of O. 65 r. 11 the true test is that laid down by the House of Lords in *Myers* v. *Elman* as explained by Sachs J. in *Edwards* v. *Edwards*. The mere fact that the litigation fails is no reason for invoking the jurisdiction of the Court to call upon the solicitor to pay costs personally; nor is an error of judgment; nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts to a serious dereliction of duty or gross negligence. Thus unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct enabling the Court to exercise the above jurisdiction.

Cases referred to:—

(1) *Myers* v. *Elman* [1940] A.C. 282.
(2) *Edwards* v. *Edwards* [1958] P. 235, 247.
(3) *Bishopgate Motor Finance Corpn. Ltd.* v. *Transport Brakes Ltd.* [1949] 1 K.B. 322, 338.

COURT OF APPEAL.

A. N. Mitra for the appellant.

1st respondent in person.

R. Murugason for the 2nd respondent.

Thomson C.J.: This is an appeal by a solicitor against an Order made against him by Hepworth J., under R.S.C., Order 65, rule 11, at the conclusion of the trial of the case of

T. P. Thanushkodi Thevar v. *Mohamed Hanif bin Mohd. Affis* (Johore Bahru High Court Civil Suit No. 71 of 1958) in which the appellant was both Solicitor and Counsel for the plaintiff.

This action arose from an agreement between the parties relating to the sale of a motor-bus, the registration No. of which is S. 1014, which had had a somewhat complicated history.

Originally, Messrs. Linggi Plantations Limited owned a bus on their Sembrong Estate with which they maintained a service running entirely over Estate roads for the benefit of themselves and their servants between the centre of the Estate and the village of Layang Layang. At some time the Company sold this bus to the defendant's father who continued to operate the Estate service with it but it remained registered in the name of the Company and the Company kept up in its own name an Insurance Policy on it. The reasons for this apparently were that the full purchase price was not paid at the time of the sale and that for the protection of its labourers the Company wished to ensure that at all times it was properly and fully insured.

In due course the defendant's father returned to his home in India and the ownership of the bus passed to the defendant but it continued to be registered and insured in the name of Linggi Plantations Limited.

Some time early in 1956, this vehicle met with an accident and to replace it the defendant purchased for $4,500 the vehicle No. S. 1014 which was then approaching the end of a long and, no doubt, useful career. It had been manufactured in 1941. It was first registered in Singapore in 1946 and was operated as a public service vehicle there for about 5 years after which it was sold to a school in Johore and was apparently operated for another 5 years as a school bus. When it was purchased by the defendant it had long ceased to be registered as a public service vehicle but of course as it was only intended to be operated on the private roads on Sembrong Estate such registration was not necessary. Like its predecessor it was not registered in the name of the defendant but in the name of Linggi Plantations Limited and again the Company took out the Insurance Policy on it in its own name, although they charged the premiums to the defendant. In connection with this purchase it is to be noted that the defendant had had to borrow $2,000 from the Estate and he at any rate regarded the registration of the vehicle in the name of the Estate as some sort of mortgage by way of security for this loan which was paid off about the end of 1957.

In February, 1958, the defendant agreed to sell to the plaintiff the bus No. S. 1014 for a sum of $6,000, $1,500 more than he had paid for it some 18 months previously. In pursuance of this agreement the plaintiff paid to the defendant sums amounting in all to $2,600 and the bus was handed over to him and for a few days operated on the Estate roads, by his employees.

After a few days the plaintiff discovered that the Estate Manager was not prepared to allow him to operate on the Estate roads. He thereupon abandoned the bus and after some exchanges, written and verbal, with the defendant, instructed the present appellant to commence proceedings to recover what he had paid on account.

Looking back, it is quite clear that the plaintiff's real case was that he had agreed to buy not only the bus but the right to operate the bus on the Estate roads or alternatively that it was a condition of the sale that the defendant would procure for him the necessary permission from the Estate Manager. In view of that the course which the proceedings took was somewhat peculiar.

On 16th September, 1958, the appellant on behalf of the plaintiff issued a specially endorsed writ to which was annexed a statement of claim to the effect that an agreement for the sale and purchase of the bus at a price of $6,000 had been made on the defendant's representation that the bus belonged to him, that the plaintiff had discovered that his representation was false and that the defendant had thereupon verbally agreed to refund the sum of $2,600 which had been paid to him.

In due course the defendant obtained leave to defend. He denied that the representation that he was the owner of the bus was false and he denied that he had ever agreed to refund the sum of $2,600 to the plaintiff. He said he was and always had been willing and able to transfer ownership of the bus to the plaintiff and he counterclaimed for $3,400 being the balance of the agreed purchase price. At this point it should be observed that on 3rd October, 1958, that is about two weeks after the issue of the writ and three days before the filing of the defence and counterclaim, the registration of the vehicle had been transferred from Linggi Plantations Limited to the defendant although it is by no means clear when the plaintiff first became aware of this fact.

In due course the plaintiff filed a reply to the defence and a defence to the counterclaim and here for the first time he made it part of his case that it was a condition of the original agreement that the defendant should obtain for him permission to operate the bus on the estate roads.

I pause here to observe that it is difficult to understand why at this stage no steps were taken to amend the plaintiff's statement of claim. As will be seen shortly the failure to do so did not affect the actual result of the case but had such steps been taken, misunderstanding might have been avoided later.

In due course, the case came on for trial before Hepworth J. On the pleadings as they stood, he refused to allow the plaintiff to make out the case that it was a condition of the sale that the defendant should obtain for him per-

mission to operate the bus on the estate roads. He pointed out, however, that as he was satisfied that the agreed price of $6,000 was for the bus alone and that there was no condition relating to permission to operate it the question was without practical importance. He found the agreement was for the sale of the bus only for $6,000, that at all material times the bus belonged to the defendant who was in a position to give a good title to it and that the defendant had not agreed to refund the sum of $2,600 to the plaintiff. In the circumstances he dismissed the plaintiff's case and gave judgment for the defendant on the counterclaim for $3,400.

That judgment has not been appealed against; the time for an appeal has now long expired; and this Court must accept it as correct.

The trial Judge, however, had formed a certain view as to the conduct of the present appellant as solicitor for the plaintiff. He took the view that having regard to the way in which the plaintiff's case was pleaded "the one vital factor" in the case was the ownership of the bus. Up to the time proceedings were commenced the bus was registered not in the name of the defendant, but in the name of Linggi Plantations Ltd. and the appellant had never addressed any enquiry to Linggi Plantations on the subject although it was highly probable that any such enquiry would have elicited the reply that the real owner of the bus was the defendant. Indeed on the 15th of November, 1958, that is, some time after the issue of the writ, an affidavit by the Estate Manager to this effect was filed by the defendant.

In the circumstances the Judge without any application being made to him by counsel for the defendant, called upon the appellant there and then to show cause under Order 65, rule 11, why the costs incurred by the plaintiff should not be disallowed as between solicitor and client and also why he should not repay to his client the costs awarded to the defendant in the action.

The appellant, apparently speaking from his place at the Bar, admitted that before the action was commenced he had not communicated with Linggi Plantations Limited. With regards to the affidavit by the Estate Manager, he said that he took his client's instructions and his client assured him that the contents of that affidavit were untrue, that he himself would give evidence at the trial to that effect and that he would produce witnesses who would support him. The appellant admitted that he had not interviewed any of the witnesses but insisted that although he had asked his client to produce them prior to the trial his client had failed to do so.

On all this the Judge came to the conclusion that "it was grossly negligent to rely solely on the plaintiff's assurance in the face of the affidavit sworn by the Manager" and that the appellant should have refused to go on with the case unless he was enabled to interview the plaintiff's witnesses and found that they supported the plaintiff.

He then proceeded to make the Order which is now appealed against.

Our Order 65, rule 11, is substantially, although not in every respect, the same as the corresponding English rule. The provisions of that rule were discussed at great length by the House of Lords in the case of *Myers* v. *Elman*[1], the effect of which was set out by Sachs J., in the following passage from his judgment in the case of *Edwards* v. *Edwards*[2]:—

> "The jurisdiction invoked is that discussed in *Myers* v. *Elman*, where its origin and nature are explained in the speeches of Viscount Maugham, Lord Atkin and Lord Wright. It is there made clear that the jurisdiction is one that the court by virtue of its inherent powers exercises over solicitors in their capacity of officers of the court. The relevant duty of the solicitor covers 'all those against whom they are concerned,' *per* Lord Maugham. It is a 'duty owed to the court to conduct litigation before it with due propriety,' *per* Lord Atkin. The conduct complained of must, before it attracts the above jurisdiction, be such as to 'involve a failure on the part of a solicitor to fulfil his duty to the court to aid in promoting in his own sphere the cause of justice,' *per* Lord Wright. The jurisdiction is exercised not to punish the solicitor but to protect and compensate the opposite party."

Sachs J., then proceeded to make the following observations:—

> "It is, of course, axiomatic, but none the less something which in the present case should be mentioned, that the mere fact that the litigation fails is no reason for invoking the jurisdiction: nor is an error of judgment: nor even is the mere fact that an error is of an order which constitutes or is equivalent to negligence. There must be something that amounts, in the words of Lord Maugham, to 'a serious dereliction of duty,' something which justifies, according to other speeches in that case, the use of the word 'gross'. .....
> It is also from the authorities clear, and no submission to the contrary has been here made, that unreasonably to initiate or continue an action when it has no or substantially no chance of success may constitute conduct attracting an exercise of the above jurisdiction."

It is thus clear that as a matter of law, it was open to Hepworth J., to invoke the jurisdiction under Order 65, rule 11, and I express no opinion as to whether had the facts been as His Lordship thought they were when he made his Order, this Court would have been justified in interfering. The facts, however, were not as His Lordship thought they were and I hasten to add that in this connection the appellant was very much at fault in not bringing the relevant facts to His Lordship's notice.

When the writ was issued on 16th September, 1958, the motor-bus was registered in the name of Linggi Plantations and not that of the defendant. That was not conclusive but it was at the lowest a fact that suggested that the defendant was not the owner. As was said by Denning L.J., in the case of *Bishopgate Motor Finance Corporation, Ltd.* v. *Transport Brakes, Ltd.*[3]:—

> "The registration book of a car, ... may not itself be a document of title, but it is the best evidence of title."

On top of this the plaintiff was prepared to say, and did in fact say in evidence at the trial, that at a meeting between himself and the defendant in the presence of the Estate Manager, the defendant had admitted that the bus was not his property. That was later held to be untrue but that was his story. The evidential value of the registration was probably destroyed when the bus was re-registered in the name of the defendant on 13th October, 1958, and thereafter the only evidence to support the plaintiff's case as originally pleaded was evidence of what happened at the interview in the Estate office.

As I understand it, the gravamen of the Judge's complaint against the appellant is that the appellant did not sufficiently investigate this incident before proceeding to trial and in particular, that he did not insist on taking statements from the plaintiff's witnesses in view of the fact that since about 15th November, 1958, he had been in possession of the Estate Manager's affidavit which contradicted denying the plaintiff's own version of this interview.

Actually, of course, this complaint reduces to one of failing to interview a single witness out of 4 of the 5 witnesses who were called at the trial for only one of them professed to have been present at the interview. Nevertheless, as the Judge has pointed out, the evidence of that witness did not support the plaintiff and it may well be that the fact that it was not going to support the plaintiff might have been ascertained in advance.

For the life of me however, I cannot understand why it was not brought to the Judge's notice by the appellant that since 18th October, 1958, he had been in possession of an affidavit which had come into existence in the course of some interlocutory proceeding. That affidavit was made by a clerk in the Estate office and was to the effect that he was present at an interview between the parties in the presence of the Manager and that "during the discussion the defendant admitted that the said bus did not belong to him and he had no right to sell."

This witness was not called at the trial and we were told the reason for his not being called was that he had gone to India. Obviously, from the plaintiff's point of view he was a very valuable witness and it is highly probable that had he been available he would have been called. The point, however, is that had the existence of this affidavit been brought to the notice of Hepworth J., it is extremely unlikely that he would have proceeded to the length of taking punitive measures against the appellant. It would then have been clear that the appellant was not relying only on his client's bare statement but he also had this affidavit and although this did not excuse entirely his failure to take a statement from the witness who was in fact called to give evidence regarding the interview in my opinion it went a long way to palliate it.

It is very easy to be wise after the event but looking back, it is quite clear that the root of all the trouble that arose at the trial was the appellant's initial failure to appreciate the true nature of his client's case and his failure when he did appreciate to amend his pleadings. That case was that what was bought was the bus and the right to operate it on the Sembrong Estate. That might have been a good case or it might have been a bad case and I desire to say nothing that would suggest any doubt on my part as to the trial Judge's conclusion that it was a bad case. Unfortunately, however, it was pleaded in the wrong way and the result was that at the trial in an endeavour to solve a case which had already been hopelessly wrecked by the state of the pleadings, the appellant was forced to rely on his original version of his case which, although he had wished to abandon it, did not necessarily involve any attempt to mislead the Court. As far as he was concerned, he was entitled to believe his client particularly when he had seen the clerk's affidavit and to take the view that apart from the question of the right to operate the bus there was something peculiar about the state of the vehicle's ownership at the date of the issue of the writ when it was still registered in the name of Linggi Plantations. And here it must be recalled that until very shortly before that date the defendant himself was under the impression that the vehicle was mortgaged to Linggi Plantations Limited.

In all the circumstances of the case, I would allow the appeal. As however, the Order appealed against was not asked for by the defendant or by the appellant's client and neither of these parties have taken any part in the conduct of the appeal and as the appellant contributed in no small measure to his own misfortunes by his failure to amend the pleadings and at a later stage to bring the clerk's affidavit to the attention of the Judge, I would make no order as to costs.

Hill and Good JJ.A. concurred.

Appeal allowed.

Solicitors: *Mitra & Co.; Murugason & Co.*

LAI TAI v. THE COLLECTOR OF LAND REVENUE

[O. C. J. (Adams J.) March 7, 1960]

[K. L. — Originating Motion No. 3 of 1960]

Land laws — Land acquisition — What is reasonable enquiry to ascertain address of owner or occupier — Special circumstances for extending period of time for application to the Collector requiring him to refer the matter for the determination of the Court — Land Acquisition Enactment (Cap. 140), ss.12(ii) and 22(iv).

Constitutional Law — Rights of property — Constitution of Federation of Malaya, Art. 13.

The applicant was the registered proprietor of land which was required for use by the Government. In 1956 a declaration of intended acquisition under section 6(i) of the Land Acquisition Enactment was made in respect of it. The Notice Server did not find the occupier of the land and notice was not served upon the applicant in accordance with section 9(iv) of the Enactment. As the applicant did not appear at the hearing, an award